VIRGINIA SECTION

UNFAIR COMPETITION—PROBABLE PUBLIC DECEPTION AS A NECESSARY ELEMENT OF THE WRONG—The following are the undisputed facts in the case of *Crump* v. *Lindsay*:[1]

The Crump Company and the Lindsay Company are competitors in the business of selling automobile accessories. They buy their supplies from the same manufacturer and distribute them in the same territory. The Crump Company issued an elaborately illustrated catalogue which was very costly in both labor and money. Shortly thereafter, the Lindsay Company issued a catalogue containing photographic reproductions of some seventy pages from the Crump catalogue, thereby taking for its own, at a very slight cost, the result of the labor and ingenuity of the Crump Company. This was objected to as constituting unfair competition in trade and an injunction against the use of the Lindsay catalogue was prayed of the court. *Held,* no injunction.

The decision is rested upon two grounds: (1) that since there was no probability that the public would be deceived by the action complained of, there was no unfair competition in the legal acceptation of the term, and (2) that the Crump Company, not having alleged or proved actual or threatened damage to its business as a result of the conduct sought to be restrained, had failed to make out a suitable case for equitable relief.

(1). The gist of the majority opinion is found in the statement that

> "The law of unfair competition is but an expansion of the common law of trade-marks; and in controversies between manufacturers and merchants the essence of the wrong is the sale of the goods of one as the goods of the other."

It is true from the standpoint of time "the law of unfair competition is but an expansion of the common law of trade-marks". Logically, however, the law of trade-marks is a mere subdivision of the law of unfair competition. To hold that the essence of unfair competition is the deception of the public, the palming off of the goods of one as the goods of another, is to apply to a new and developing field of jurisprudence the distinguishing test of one of its subdivsions. And to what end? To the end that the law may be stultified and progress impeded.

Let us see. In the case under discussion, the competitors sold goods obtained from the same source. They sold goods of like nature. A description of one company's goods constituted a true description of the goods of the other company. Thus it was im-

[1] (Va.) 107 S. E. 679 (1921).

possible for one company to palm off its goods as the goods of the other. Its goods were the same as the goods of the other. The unwary public could by no means be deceived. If the true test of unfair competition be that applied by the court, no means of competition between these concerns, let them be as foul as possible, can be legally "unfair". Regardless of the actual facts, their relations are necessarily just and right in the eyes of the law. Can a doctrine which leads to such an absurdity be consonant with reason?

Is the law to let alone the relationship between competitors, one of whom takes unfair advantage of the other simply because the plaintiff cannot set himself up as a representative of a deceived public? It would seem that the public is vitally interested in the honesty of business relations in general and that if the law seeks to serve the public in an enlightened fashion, it should not limit itself to investigation of dishonesty leading to direct fraud on the public. And what of the plaintiff? Should he be deprived of his equitable right to fair dealing because he cannot join with him the general public? We think not, and we rely upon the Supreme Court of the United States for support.

That learned tribunal, in the case of *International News Service* v. *Associated Press*,[2] plainly discards the requirement of public deception as a necessary element in unfair competition. The facts in that case were briefly these: The Associated Press, at great expense and with great labor and ingenuity, gathered news from all parts of the world and had it cabled to New York. Before being printed, the news was published on bulletin boards in New York. The International News Service copied these bulletins, wired them to the Western States, and published them in its papers. Because of time differentials, the news came as quickly from the International as from the Associated Press. The action of the International News Service was enjoined.

It was argued on behalf of the International News Service that all property rights in the news disappeared upon its publication on the bulletin boards, and that therefore there was no "palming off" on the public. Hence that there was no unfair competition.

It was conceded by the court that published news is not private property, but the action of the International News Service was enjoined as nevertheless constituting unfair competition. Mr. Justice Pitney, in his learned opinion, said:

> "We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common law right of the proprietor of an unpublished work to prevent its publication without his

[2] 248 U. S. 215, 39 Sup. Ct. 68 (1917).

consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here, not with restrictions upon publication, but with the very facilities and processes of publication. * * * The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of one are liable to conflict with those of the other, each party is under a duty to conduct its own business so as not unnecessarily or unfairly to injure that of the other.

"Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. *The question here is not so much the rights of either party as against the public, but their rights as between themselves.* (Italics ours.) See *Morison* v. *Moat,* 9 Hare 241, 258. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor and money, and to be distributed and sold to those who will pay for it, as for any other merchandise."

Again, in answer to counsel for the International News, the learned justice says:

"The fault in reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of the complainant and defendant, competitors in business, as between themselves."

As remarked in a forceful article in an earlier volume of the VIRGINIA LAW REVIEW,

"Mr. Justice Pitney's opinion would seem to put to rest and to a deserved death the principle that in order to constitute such unfair competition as to justify the intervention of the courts, there must be some element of probable public deception, or some conduct tending to pass off one man's business or merchandise as that of another." [3]

The attempt made by the Virginia Court in the *Crump* case to distinguish the *International News* case is a failure. The Virginia Court remarks that the use of news

"* * * by the public after its publication was not restrained, and the injunction restrained the competing company from using it only so long as it had special value as news. All other

[3] 7 Va. Law Rev. 368.

persons who were not competitors might freely utilize it from the moment of its first publication".

Quite so. But wherein lies the distinction? It is not sought to restrain the use of the catalogue by the public, nor its use by the competing company save only so long as it has special value as advertisement.

Next, the Virginia Court declares that the Supreme Court

> "* * * distinctly recognized the unbroken line of decisions relating to unfair competition between traders, and sanctioned the general doctrine characteristic of this class of cases, that there is no unfair competition unless the defendant attempts to palm off its goods as those of complainant, * * * expressing this idea in this way:
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> " 'Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business, because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition principally in this: That, *instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.*' " (Italics ours.)

Truly this *sounds* as though the deceived public were still in the arena, and as though the requirement that it be present were sanctioned. Let the words be used as they were clearly defined by Mr. Justice Pitney, however, and the illusion is dispelled. Time and again, the "property interest" which has been "misappropriated" was declared to be an interest *solely between the parties.* The public is not concerned with that. It is not deceived as to that. Nothing is "palmed off" on it. So far as it is concerned, published news is everybody's news. If the court meant to revert to the idea of a deceived public, why was not the view of one of the dissenting justices, advocating simply that the International News Service be required to acknowledge the source of its information, adopted by the majority of the court? If the deception of the public were the gist of the wrong, such would be the appropriate remedy. We find no sanction for the "deception doctrine" in the language of Mr. Justice Pitney.

The case of *Crump* v. *Lindsay* was one of novel impression in this State. Numerous decisions in other States and in the Federal Circuit Courts had enunciated the "deception doctrine" [4] The Supreme Court of the United States had distinctly repudiated it. In seeking to distinguish the *International News* case, *supra,* and

[4] Manitowoc Malting Co. *v.* Milwaukee Malting Co., 119 Wis. 543, 97 N. W. 389 (1903); Heide *v.* Wallace (C. C.), 129 Fed. 649 (1904). See also Fisher *v.* Star Co. (N. Y.), 132 N. E. 133, which will be discussed in a later issue of this volume of the VA. LAW REV.

adopting the test appropriate to trade-mark law as applicable throughout the law of unfair competition, our court not only rejects a principle which stands for the enforcement of right dealing in business, but hampers that enforcement with a useless technicality.

(2). As to the second point, we believe the decision to have been correct. If there was nothing in the record to show actual or threatened damage, then no case is made out. And the court cannot go beyond the record.

> "In a suit for injunction allegations of damage are not necessary in the sense that the amount which the plaintiff should recover enters into the determination of the right to equitable relief, but are essential only in order that the court may determine that the plaintiff's injuries are of such substance as to warrant the equitable intervention of the court." [5]

It appears to us, then, that the result reached by the court was correct. Our objection is that the case stands as authority for a false principle in the law of unfair competition.

T. L. P.

RECORDATION OF CONDITIONAL SALES TO PARTNERSHIPS UNDER VIRGINIA CODE 1919, § 5189—In construing § 5189 of the Code, requiring that conditional sales or contracts for the sale upon condition of goods and chattels shall be void as to creditors and purchasers for value and without notice unless recorded and indexed "in the *name* of both the vendor and vendee", the Virginia Court recently decided that the statute was sufficiently complied with by a recordation of a contract for the sale of goods to a copartnership made in and indexed under the *firm name,* though the names of the individual partners were not stated in the contract.[1]

While admitting that such a construction would probably lead to great inconvenience "because a partnership may and often does take a fictitious name, and therefore that indexing such contracts in such fictitious name will not give the notice to the public which is contemplated", yet the Court held that it could not supply the statute with essential provisions which the General Assembly had omitted. But in conclusion Judge Prentis, who delivered the opinion of the Court, said:

> "The subject, however, should receive the attention of the General Assembly, and, in order that the records shall give proper notice, such contracts should be required expressly to state whether the vendee is a copartnership or a corporation, and, if a copartnership, that the names of the copartners shall be stated and that they shall be indexed in the name of each partner as well as in the name of the firm."

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[5] 10 Enc. Pl. and Prac. 950.

[1] Harris, Woodson, Barbee Co. Inc. *v.* Gwathmey (Va.), 107 S. E. 658 (1921).